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PENTADBIR TANAH JOHOR BAHRU v. TANAH SUTERA DEVELOPMENT SDN BHD

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COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
AHMAD ZAIDI IBRAHIM JCA
AZMAN ABDULLAH J
[CIVIL APPEAL NO: J-01(A)-324-06-2021]
31 MAY 2023

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Abstract – *(i) The delay of one day in the service of the record of appeal could not be prejudicial to the respondent at all, especially when the respondent is already conscious of the fact that there is an appeal filed; (ii) In a case where a respondent has given its notice of cross-appeal but the appellant fails to get its appeal ready by filing its record of appeal, the respondent may proceed with his cross-appeal. In such a case, the respondent shall, within such time as may be allowed by the court, file a record of appeal.*

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CIVIL PROCEDURE: *Appeal – Appeal record – Application for enlargement of time – Delay of one day by appellant in service of record of appeal – Whether delay prejudicial to respondent – Whether respondent conscious of fact that there was appeal filed – Whether application ought to be allowed – Rules of the Court of Appeal 1994*

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CIVIL PROCEDURE: *Appeal – Striking out – Application for – Whether notice of appeal bad in law and incompetent such that it should be struck out for not disclosing questions of law appealed against – Whether notice of appeal bad in law and incompetent by virtue of s. 40D(3) and proviso to s. 49(1) of Land Acquisition Act 1960 ('LAA') – Whether question stated in memorandum of appeal were questions of law for purpose of appeal – Whether one-day late service of record of appeal curable – Whether memorandum of appeal failed to comply with r. 18(1) of Rules of the Court of Appeal 1994 ('RCA') – Whether decision of High Court complied with s. 40C of LAA – Whether non-inclusion of 'judge's notes' fatal such that appeal ought to be struck out – Whether objection on ground that 'separate volumes' of appeal record not filed was valid in circumstances of case*

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The High Court, sitting as a land reference court, had increased the amount of compensation with respect to part of the respondent's land that had been compulsorily acquired by the Government. Aggrieved by the said decision, the Land Administrator filed a notice of appeal to the Court of Appeal. The respondent, the company whose land had been acquired, filed a notice of cross-appeal. The respondent filed a motion to strike out the appeal on the grounds that: (i) the notice of appeal was defective as it did not set out the questions of law for the Court of Appeal to answer; (ii) the appeal was barred by ss. 40D(3) and 49(1) proviso in the Land Acquisition Act 1960 ('LAA');

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(iii) the appellant was one day late in serving its appeal record on the respondent's solicitors; (iv) its memorandum of appeal was defective for non-compliance with r. 18(1) of the Rules of the Court of Appeal 1994 ('RCA'); (v) its appeal was academic since both the assessors at the High Court had already furnished their respective written opinions under s. 40C; and (vi) its appeal was incompetent (a) for failing to attach to the record of appeal a copy of the judge's notes, pursuant to r. 18(4)(b) of the RCA; (b) because it did not comply with Arahan Amalan 02/1991 by applying for notes of proceedings; and (c) because it did not compile Parts A, B and C of the appeal record into separate volumes.

Held (allowing encl. 18 in part; dismissing encl. 54)
Per Lee Swee Seng JCA delivering the judgment of the court:

(1) There was no need to read into Form 1 the requirements that were not there. Grounds of appeal and with the questions of law appealed on were best framed and formulated after the full grounds of judgment were furnished to the parties. By and large, the full grounds may not be available on the date of the decision but on brief or broad grounds and upon an appeal being filed within 30 days from the date of the decision, the full grounds of judgment would be prepared and subsequently furnished by the High Court Judge. The court had a difficulty appreciating the argument of the respondent that the notice of appeal was vague, uncertain and confusing as it did not convey with sufficient clarity whether the appeal was on law or otherwise and on which head of award of compensation and that had led to misapprehension as to what questions of law the respondent needed to answer to. However, the respondent had no difficulty in filing its notice of cross-appeal after the service on the respondent of the record of appeal containing the memorandum of appeal, setting out the questions of law that the appellant was appealing on. There was no ambiguity or misapprehension here as to what was appealed against. There was only one decision of the High Court at Johor Bahru delivered on 6 May 2021 involving the parties that the appellant was appealing against. (paras 22-24 & 26)

(2) The notice of appeal and record of appeal were both filed on time. The delay of one day in service of the record of appeal could not be prejudicial to the respondent at all. The respondent was already conscious of the fact that there was an appeal filed. In fact, most solicitors would not even raise the objection of a one-day delay in service and many would not object to an application made to extend time to file the memorandum of appeal or to deem what had been filed and served to have been validly filed and served. Rule 94 of the RCA allowed for enlargement of time by consent in writing, obviating the need to make an application to the court or a judge. It would be disproportionate to dismiss the appellant's appeal based on his one-day

delay in serving its record of appeal on the respondent, especially when the respondent had filed its motion for enlargement of time to regularise that one-day late service, before his appeal had been set down for hearing. (paras 53-55)

(3) All three elements required by r. 18(1) of the RCA, namely (i) the head of the objection; (ii) the ground of the objection; and (iii) the point of law wrongly decided by the High Court, were all reflected in each of ground of appeal in the memorandum of appeal. It hardly laid in the mouth of the respondent to say that the grounds of appeal were too vague and general as it had no problem filing its notice of cross-appeal. A cross-appeal was after all an appeal on precisely the same point that the appellant was appealing on except that an opposite result was argued by the respondent instead. The respondent had never claimed in its affidavits that it was unable to comprehend the grounds of appeal in the memorandum of appeal. More importantly, the respondent had not alleged, let alone shown, that it suffered a substantial miscarriage of justice, as required under r. 3A of the RCA. (paras 67, 69 & 71)

(4) The question as to what was sufficient compliance with s. 40C of the RCA and the effect of non-compliance was a question of law that should properly be heard at the substantive appeal. The respondent's striking out application was thus without merit and misconceived. (para 80)

(5) The 'judge's notes of the hearing' were inapplicable in the instant case as they were only applicable to appeals after a full trial with *viva voce* evidence which was not the case here. This court had a discretion in ordering that the appellant do proceed with the appeal without the 'judge's notes of the hearing' as the High Court had already stated that the 'judge's notes of the hearing' were the same as the grounds of judgment furnished by the judgment. (paras 87 & 98)

(6) What the appellant had done was to merely merge Part A and Part B and a few documents from Part C in the volume. The reason for that was because Part A only had 15 pages while Part B had none. The appellant incorporated 186 pages from Part C into that first volume that had Part A (27 pages) and Part B (nil). The court could not see how the appellant's chosen method of compilation was fatal to its appeal. The respondent had not objected to this compilation upon being served with the appeal record. The objection was frivolous and without merits and hence, dismissed. (paras 105, 106 & 108)

(7) It could be seen that the respondent's grounds of cross-appeal did not relate to and indeed were unconnected to the grounds of appeal of the appellant as evident in its memorandum of appeal. As such, the respondent should have filed its own separate notice of appeal on time and not a notice of cross-appeal. The respondent may only cross-appeal

against a point already in issue in a valid appeal since the cross appeal derived its life from that appeal. Thus, where a High Court had rejected a respondent's argument and such a rejection resulted in a decision adverse to the respondent for which the respondent was aggrieved, then the respondent must file a separate notice of appeal and not a cross-appeal if the respondent wished to reverse or set aside that decision. Likewise, if a respondent wished the Court of Appeal to rehear the issues that were not decided in that respondent's favour, then that respondent must file an independent and separate notice of appeal. (paras 116 & 120)

(8) The court allowed encl. 18 filed by the appellant for enlarging time to serve the record of appeal which was served one day late. It was clearly excusable and curable in the circumstances of the case when the Movement Control Order was in force. As for the other prayer in encl. 18 to strike out the cross-appeal, the court found that it should have been by way of a separate motion and in any event the appellant had agreed to withdraw that prayer and so, the court dismissed that prayer. Enclosure 54 was the respondent's motion to strike out the notice of appeal. The court dismissed the respondent's motion with costs in the cause. The respondent said it was serious with its cross-appeal and if the court were to strike out the main appeal, the cross appeal would fall with it. In any event, the questions of law to be decided on appeal had been set out in the memorandum of appeal and so, the respondent was not prejudiced. (paras 130-133)

Case(s) referred to:

A Santamil Selvi Alau Malay & Ors v. Dato' Seri Mohd Najib Tun Abdul Razak & Ors [2015] 4 CLJ 1016 CA ***(refd)***

Amitabha Guha & Anor v. Pentadbir Tanah Daerah Hulu Langat [2021] 3 CLJ 1 FC ***(refd)***

Douglas Ding Jangan & Ors v. Kerajaan Negeri Sarawak & Ors [2021] 7 CLJ 653 FC ***(refd)***

Jacy Tintang & Anor v. Mayan Nayang [2022] 7 CLJ 682 CA ***(refd)***

Joseph Lee Yok Min v. Mayban Securities Sdn Bhd & Anor [2014] 3 CLJ 285 CA ***(refd)***

Kabushiki Kaisha Ngu v. Leisure Farm Corporation Sdn Bhd & Ors [2016] 8 CLJ 149 FC ***(refd)***

Khairy Jamaluddin v. Dato' Seri Anwar Ibrahim & Another Appeal [2022] 6 CLJ 163 25 FC ***(refd)***

Lee Guat Eng v. Tan Lian Kim [1985] 1 LNS 26 SC ***(refd)***

Low Cheng Soon v. TA Securities Sdn Bhd [2003] 1 CLJ 309 CA ***(refd)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645 FC ***(refd)***

Muniandy Subrayan & Ors v. Chairman And Board Members, Koperasi Menara Maju Bhd [1997] 1 CLJ 417 CA ***(refd)***

National Union Of Bank Employees v. Director General Of Trade Unions & Anor [2013] 7 CLJ 957 FC ***(refd)***

A *Neoh Choo Ee & Co Sdn Bhd v. Vasalamany Govindasamy & Anor [2004] 3 CLJ 321 486 CA* ***(refd)***
Palata Investments Ltd & Ors v. Burt & Sinfield Ltd & Ors [1985] 2 All ER 517 ***(refd)***
Pengerusi Suruhanjaya Pilihanraya Malaysia v. See Chee How & Anor [2015] 8 CLJ 367 CA ***(refd)***
Pentadbir Tanah Daerah Johor Bahru v. Nusantara Daya Sdn Bhd [2021] 7 CLJ 1 FC
B ***(refd)***
Scott & English (M) Sdn Bhd v. Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors [1994] 3 CLJ 114 HC ***(refd)***
Shahrum Hj Kazindin v. Pentadbir Tanah Daerah Petaling, Selangor [2019] 1 LNS 622 HC ***(refd)***
Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017]
C *5 CLJ 526 FC* ***(refd)***
Siaw Swee Mie v. Lembaga Lebuh Raya Malaysia [2018] 4 CLJ 196 CA ***(refd)***
Syed Hussain Syed Junid & Ors v. Pentadbir Tanah Negeri Perlis [2013] 9 CLJ 152 FC ***(refd)***
Tan Kim Beng & Ors v. Datuk Yen Ying Pang & Ors [2012] 1 LNS 1307 CA ***(refd)***

D **Legislation referred to:**
Courts of Judicature Act 1964, ss. 3, 28(1), 68(1)(d)
Land Acquisition Act 1960, ss. 40C, 40D(3), 49(1)
Rules of the Court of Appeal 1994, rr. 3A, 5, 8, 10, 18(1), (4)(b), (7), (9), 19, 93, 102, 103, 104, First Schedule

E *For the appellant - Adi Radlan Abdul Rahman; M/s Adi Radlan & Co & Muhammad Azzam Zainal Abidin; State Legal Advisor, Johor*
For the respondent - Ibrahim Hashim & Haffirrudin Osman; M/s Haffirrudin Osman & Co

Reported by Lina E

F **JUDGMENT**

Lee Swee Seng JCA:

[1] Both parties have filed applications to derail the other in their appeals before the Court of Appeal. The appellant in its motion in encl. 18 had
G prayed to extend the time to serve the record of appeal by one day for it was one day late in serving on the respondent, though filed within time. The other prayer in the same motion is to strike out the notice of cross-appeal filed by the respondent.

[2] The respondent on the other hand had filed an application in encl. 54
H to strike out the notice of appeal filed by the appellant principally on ground that the notice of appeal does not disclose the questions of law for the appeal. There were other grounds for striking out the notice of appeal and these will be considered below.

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At The High Court

[3] The High Court sitting as a land reference court had increased the amount of compensation with respect to part of the respondent's land that had been compulsorily acquired by the Government.

[4] The High Court had granted compensation under the heads of severance and injurious affection which was not granted by the Land Administrator. Diagram 1 below shows the award of the High Court as opposed to that of the Land Administrator and the increase in compensation as follows:

Diagram 1
Extract from brief grounds of decision

	Compensation Amount	**Award of Land Administrator**	**Additional Compensation**
Value of 13 terrace plots of 1439.11 meter^2	RM2,734,309.00	RM3,056,010.00	(RM321,701.00)
Nominal Value for Road Reserve of 2,989.89 meter^2	RM10.00		RM10.00
Severance	RM3,927,395.00		RM3,927,395.00
Injurious Affection	RM1,145,472.00		RM1,145,472.00
Incidental Cost	RM117,210;00		RM117,210.00
Loss of rental	RM20,000.00		RM20,000.00
TOTAL	RM7,944,396.00	RM3,056,010.00	RM4,888,386.00

[5] Aggrieved by the said decision, the Land Administrator had filed a notice of appeal to the Court of Appeal. The company, Tanah Sutera Development Sdn Bhd, whose land had been acquired did not file a notice of appeal but instead filed a notice of cross-appeal.

Before The Court Of Appeal

[6] The respondent before us had filed a motion to strike out the appeal, presumably under r. 104 of the Rules of the Court of Appeal 1994 ("RCA") and the relevant rr. 102 to 104 are set out below as follows:

A **PART IV**

Effect of Non-Compliance

102. Non-compliance with Rules not to render proceedings void

Non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit.

103. Application to set aside for irregularity when allowed

No application to set aside any proceedings for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.

104. Objections of irregularity

When an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the summons or notice of motion.

[7] The grounds for striking out the notice of appeal are spelt out as follows:

(i) that the notice of appeal was defective as it did not set out the questions of law for the Court of Appeal to answer;

(ii) that the appeal is barred by s. 40D(3) and s. 49(1) proviso in the Land Acquisition Act 1960 ("LAA");

(iii) that the appellant was one day late in serving its appeal record on the respondent's solicitors;

(iv) that its memorandum of appeal is defective for non-compliance with r. 18(1) of the RCA;

(v) that its appeal is academic since both the assessors at the High Court have already furnished their respective written opinions under s. 40C;

(vi) that its appeal is incompetent for failing to attach to the record of appeal a copy of the judge's notes, pursuant to r. 18(4)(b) of the RCA 1994;

(vii) that its appeal is incompetent because it did not comply with Arahan Amalan 02/1991 by applying for notes of proceedings; and

(viii) that its appeal is incompetent because it did not compile Parts A, B and C of the appeal record into separate volumes.

[8] These grounds may be succinctly summarised as follows:

(i) the 'notice of appeal *vis-à-vis* Form 1' objection;

(ii) the 's. 40D(3) and s. 49(1) proviso' objection;

(iii) the 'one-day late service' objection;

(iv) the 'memorandum of appeal *vis-à-vis* r. 18(1)' objection;

(v) the 's. 40C' objection;

(vi) the 'judge's notes' objection;

(vii) the 'Arahan Amalan 02/1991' objection; and

(viii) the 'separate volumes' objection.

Whether The Appellant's Notice Of Appeal Is Bad In Law And Incompetent Such That It Should Be Struck Out For Not Disclosing The Questions Of Law Appealed On

[9] The respondent had, by its amended motion in encl. 54 dated 23 May 2022 (initially filed on 27 September 2021 as encl. 14 motion), sought to strike out the appellant's notice of appeal principally on ground that the notice of appeal does not disclose the questions of law appealed from.

[10] The appeal in the instant case by the Land Administrator had been made presumably under s. 49(1) of the LAA which s. 49 reads as follows:

> **49. Appeal from decision as to compensation**
>
> (1) Any person interested, including the Land Administrator and any person or corporation on whose behalf the proceedings were instituted pursuant to section 3 may appeal from a decision of the Court to the Court of Appeal and to the Federal Court:
>
> **Provided that where the decision comprises an award of compensation there shall be no appeal therefrom**
>
> (2) Every appeal under this section shall be presented within the time and in the manner provided for appeals in suits in the High Court:
>
> Provided that the time within an appeal may be presented shall only be capable of enlargement by order of a Court in such special circumstances as the Court may think fit.
>
> (3) (Omitted) (emphasis added)

[11] It is common ground as confirmed by case law that any appeal from the decision of the High Court sitting as a land reference court has to be on questions of law.

[12] Rule 5 of the RCA reads:

5. Appeal to be by re-hearing on notice

(1) Appeals to the court shall be by way of re-hearing and shall be brought by giving notice of appeal.

(2) Security for costs shall be given as provided in rule 17.

(3) **A notice of appeal shall substantially be in Form 1 in the First Schedule.**

(4) Any appellant may appeal from the whole or part of a judgment or order and the notice of appeal shall state whether the whole or part only, and what part, of the judgment or order is complained of. (emphasis added)

Form 1 of the First Schedule of the RCA is set out below:

NOTICE OF APPEAL

Take notice that ..... being dissatisfied with the decision(s)

of the Honourable Mr. Justice ..... given at ..... on the ..... day of ..... 19 ..... appeals to the Court of Appeal against **(the whole of the said decision(s) either/or (such part only of the said decision(s) (as decides that**

(Set out details)

Dated this ..... day of ..... 19...

.....

Appellant
Solicitor for the Appellant
(emphasis added)

[13] All that Form 1 requires is that an appellant states whether he is appealing against the whole or only a part of the High Court's decision. In our case, the appellant (Pentadbir Tanah Johor Bahru) is appealing against the whole of the decision. That is precisely what is said in its notice of appeal.

[14] This is to be contrasted with the notice of cross-appeal which is to be filed not more than ten days after the service of the record of appeal which contains the memorandum of appeal of the appellant setting forth the grounds of appeal and the questions of law in a case of an appeal from the High Court in a land reference matter. See: r. 8 of the RCA. The notice of cross-appeal shall be substantially in Form 2 in the First Schedule to the RCA which reads as follows:

NOTICE OF CROSS-APPEAL

Take notice, that on the hearing of the above appeal, CD., the Respondent above-named, will contend that the decision's) of the Honourable Mr. Justice .....

given at ..... on the ..... day of ..... 19 ..... ought to be varied to the extent and on the grounds hereinafter set out:

(Set out in numbered paragraphs:

(a) the nature of the relief claimed; and

(b) the grounds relied upon.)

Dated at ……the day of ……,19…..

.....
Respondent
Solicitor for the Respondent
(emphasis added)

[15] The requirement of setting out "the grounds relied upon" by the respondent in a notice of cross-appeal is not found in a notice of appeal that which merely requires the appellant to state if it is appealing against "the whole of the said decision(s) either/or ("such part only of the said decision(s) (as decides that…..(set out the details)").

[16] One can surmise that the reason why a notice of cross-appeal is only required to be filed not more than ten days after the service of the record of appeal is that by that time the respondent would have read the memorandum of appeal and would apprise itself of the grounds of appeal and the questions of law set out in the memorandum of appeal. If the grounds of appeal are required to be set out in the notice of appeal, then there would have been no necessity to require a notice of cross-appeal, if the respondent is minded to file it, to do so only after the service of the record of appeal and not later than ten days after such a service.

[17] Learned counsel for the respondent submitted that the notice of appeal itself must state the questions of law that the appellant is appealing against in order, at the outset of the appeal process, to meet the threshold requirement under s. 49(1) of the LAA which only allows an appeal on questions of law.

[18] The Court of Appeal has resolved this issue with finality in *A Santamil Selvi Alau Malay & Ors v. Dato' Seri Mohd Najib Tun Abdul Razak & Ors* [2015] 4 CLJ 1016; [2015] 4 MLJ 583 where it held that there is no need for the appellant to disclose in his notice of appeal the issues or points or questions of law that he wishes to appeal against. The Court of Appeal said at p. 1023 (CLJ); p. 590 (MLJ) as follows:

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> [14] In our view, where the appeal is against one decision involving a single respondent or involving more than one respondent in a joint action, it will be in order for the appellant to state in a single notice of appeal that he is appealing against "the whole of the said decision" **without setting out the details of the decision appealed against** …
>
> (emphasis added)

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[19] Likewise, the Court of Appeal in *Neoh Choo Ee & Co Sdn Bhd v. Vasalamany Govindasamy & Anor* [2004] 3 CLJ 321; [2002] 2 MLRA 486 dispelled the erroneous view that there is any requirement for the appellant to expressly state the question of law in the notice of appeal. That case was a decision of the Director General of Labour on the calculation of the rate of pay with respect to whether outturn allowance should be taken into account. The respondent being dissatisfied with the decision, appealed by giving a notice of appeal to the High Court. For the purposes of such an appeal, the Director General of Labour is treated as a subordinate court by virtue of s. 3 of the Courts of Judicature Act 1964 ("CJA") read together with s. 28 of the CJA.

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[20] Section 28(1) of the CJA reads as follows:

> 28(1) Subject to any other written law, **no appeal shall lie to the High Court** from a decision of a subordinate court in any civil cause or matter where the amount in dispute or the value of the subject-matter is ten thousand ringgit or less **except on a question of law.** (emphasis added)

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[21] Gopal Sri Ram JCA (later FJ) clarified and confirmed the position of the law that where an appeal is permitted only on questions of law, there is no necessity that the questions of law must be stated in the notice of appeal. It is enough if it is stated in the memorandum of appeal. His Lordship stated at pp. 488 to 489 as follows:

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> The section [s. 28 CJA] does not say that the notice of appeal should expressly state the questions of law. Neither does O. 49 of the Subordinate Court Rules 1980 nor O. 55 of the Rules of High Court 1980. *We therefore find that there is nothing wrong with the notice of appeal lodged by the appellant with the High Court. It conforms with the statutory form provided by the rules of court.* It has not prejudiced the respondents in any way. Indeed, they made no complaint about it in the first place. It was the High Court which took the point *suo motu*. That shows there was no prejudice. If there had been, counsel for the respondents would surely have complained. We are therefore, with respect, unable to agree with the learned judge that a notice of appeal in Form 140 of Subordinate Court Rules 1980 should set out the question or questions of law which the appeal involves. We agree with Mr A Suppiah of counsel for appellant that *points of law will in the usual way be taken in the memorandum of appeal and it is to that document that the High Court ought to have resort. If upon reading the memorandum of appeal and the record of appeal as a whole the High Court comes to the conclusion that the appeal does not involve a question of law, then it would no doubt deal with the point in the ordinary way, when the appeal is called on for hearing.*

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But it must be said at once in fairness to the learned judge that he was persuaded to take the view he took by two decisions of the High Court. In Malayan *Banking Bhd v. Syed Ali Mohsin* [1991] 2 MLRH 25; [1991] 3 CLJ (Rep) 236, Lamin Yunus J (as he then was) said:

> I am of the view that in the case of an appellant intending to appeal on questions of law, the notice of appeal in Form 140, must state at least in general form the question or questions of law that he wishes to appeal on.

Again in *Mohamad Safuan Wasidin & Anor v. Mohd Ridhuan Ahmad (An Infant)* [1994] 4 MLRH 432; [1994] 2 MLJ 187, Abdul Malik Ishak J expressed the following view:

> In my judgment, in the case of an appellant intending to appeal from the decision of the subordinate court where the quantum is less than RM10,000.00, the notice of appeal in Form 140 must state generally the question or questions of law that he wishes to appeal on. Any failure to conform to this basic statutory requirement would strike at the very core of the appeal and, consequently, would nullify the appeal.

Now it is plain that the views expressed in those two cases do not coincide with the opinion we have expressed a moment ago. In our opinion those cases were wrongly decided and should no longer be considered good law. For otherwise, the court would be imposing a condition of appeal that written law does not prescribe.

(emphasis added)

[22] There is thus no need to read into Form 1 the requirements that are not there. Grounds of appeal and with that the questions of law appealed on are best framed and formulated after the full grounds of judgment are furnished to the parties. By and large, the full grounds may not be available on the date of the decision but only brief or broad grounds and upon an appeal being filed within 30 days from the date of decision, then the full grounds of judgment would be prepared and subsequently furnished by the High Court Judge.

[23] We have difficulty appreciating the argument of the respondent that the notice of appeal is vague, uncertain and confusing as it did not convey with sufficient clarity whether the appeal is on law or otherwise and on which head of award of compensation and that had led to misapprehension as to what questions of law the respondent needed to answer to.

[24] However, the respondent had no difficulty in filing its notice of cross-appeal after the service on the respondent of the record of appeal containing the memorandum of appeal, setting out the questions of law that the appellant is appealing on.

[25] The Federal Court case of *Khairy Jamaluddin v. Dato' Seri Anwar Ibrahim & Another Appeal* [2022] 6 CLJ 163; [2022] 5 MLRA 25 was cited in support of the respondent's proposition but the Federal Court was

addressing the issue of whether filing a single notice of appeal against two decisions was ambiguous, defective and bad in law and should be struck out. The Federal Court found that the two decisions appealed against were clearly stated in the notice of appeal so as not to render it defective or bad in law. In that context the Federal Court observed as follows:

> [28] It is important to bear in mind that the primary objective of r. 5(3) of the RCA 1994 is to enable the opposing party to be properly informed of the case they have to answer. If the opposing party is unable to fathom which decision or which part of a decision is being appealed against, it would lead to uncertainty and misapprehension on the part of the opposing party and as to what points they were required to answer to. Such a situation would undoubtedly cause prejudice and a miscarriage of justice to the opposing party.
>
> [31] In situations where, a preliminary objection is taken against a notice of appeal in the Court of Appeal or where a motion is filed to that effect, it is therefore incumbent upon the Court of Appeal to scrutinise the notice of appeal in question. It is for the Court of Appeal to consider whether the appeal relates to a single decision, or more than one decision, or is against part of the decision or decisions given; and if so, whether the decisions in question have been clearly and concisely identified. There should not be any ambiguity or doubt relating to the decision appealed against.

[26] There is no ambiguity or misapprehension here as to what was appealed against here. There was only one decision of the High Court at Johor Bahru delivered on 6 May 2021 involving the partiers that the appellant is appealing against. If it is so vague, uncertain, confusing and ambiguous, then the respondent should have filed its application to strike out the appeal upon being served with the notice of appeal, rather than making the application in encl. 14 on 27 September 2021 after some 53 days from being served with the record of appeal including the appellant's memorandum of appeal, before it filed encl. 54 on 23 May 2022 which is the amended motion to strike out this appeal.

[27] Learned counsel for the respondent also took umbrage that the notice of appeal had not stated if the appeal against the decision is for an interlocutory matter or after full trial as required under para. 3.4 Arahan Amalan Mahkamah Rayuan Bil. 1 Tahun 2017. The said para. 3.4 of the practice direction reads as follows in its original language:

> 3.4 Notis Rayuan bagi kes sivil hendaklah menyatakan dengan jelas sama ada rayuan adalah terhadap keputusan bagi permohonan interlokutori atau selepas perbicaraan penuh. Borang 1 (Notis Rayuan) Kaedah-Kaedah Mahkamah Rayuan 1994 hendaklah dipatuhi.

[28] Learned counsel for the respondent submitted that the appellant's notice of appeal is ambiguous, doubtful, defective and bad in law and should be dismissed *in limine*. We disagree. It would be tantamount to using a machete to kill a fly. It is an irregularity that is curable and in the circumstances of this appeal where there are no decisions on any interlocutory applications, the confusion of the respondent is more imaginary rather than real.

[29] The respondent had earlier filed its notice of cross-appeal on 11 August 2021 with no difficulty whatsoever. Rule 103 of the RCA is clear in that no application to set aside any proceedings for irregularity shall be allowed if the applicant had taken fresh step in the proceeding after knowledge of the irregularity. It reads:

> **103. Application to set aside for irregularity when allowed.**
>
> No application to set aside any proceedings for irregularity shall be allowed unless **made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.**
>
> (emphasis added)

[30] Both on point of procedure as required under Form 1 and for practical purposes, it is sufficient if the questions of law are stated in the memorandum of appeal.

Whether The Notice Of Appeal Is Bad In Law And Incompetent By Virtue Of s. 40D(3) And The Proviso To s. 49(1) Of The Land Acquisition Act 1960

[31] Learned counsel for the respondent argued that the Land Administrator as the appellant is barred from appealing against the High Court's decision by virtue of s. 40D(3) and the proviso to s. 49(1) of the LAA 1960. Section 40D(3) of the LAA 1960 reads:

> (3) Any decision made under this section is final, and there shall be no further appeal to a higher court on the matter.

[32] It was further argued that there can be no appeal against the High Court's decision which comprises an award of compensation which decision is final and non-appealable under s. 68(1)(d) of the CJA and hence this court lacks in jurisdiction. Section 68(1)(d) of the CJA reads:

> 68. Non-appealable matters
>
> (1) No appeal shall be brought to the Court of Appeal in any of the following cases:
>
> (d) **where, by any written law for the time being in force, the judgment or order of the High Court is expressly declared to be final.** (emphasis added)

[33] To set the record straight, s. 40D has been declared unconstitutional by the Federal Court in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 4 MLRA 554. The Federal Court noted in *Pentadbir Tanah Daerah Johor Bahru v. Nusantara Daya Sdn Bhd* [2021] 7 CLJ 1; [2021] 4 MLJ 570 at [71] that it is unfortunate that the provision has not hitherto been repealed.

[34] As for the bar against appeal, that is found in the proviso to s. 49(1) of the LAA. Section 49(1) permits an appeal to the Court of Appeal and thereafter to the Federal Court without the need for leave of the Federal Court from a decision of the Court of Appeal except where the decision compromises an award of compensation. See also the Federal Court case of *Syed Hussain Syed Junid & Ors v. Pentadbir Tanah Negeri Perlis* [2013] 9 CLJ 152. Section 49(1) reads:

> **49. Appeal from decision as to compensation**
>
> (1) Any person interested, including the Land Administrator and any person of corporation on whose behalf the proceedings were instituted pursuant to section 3 may appeal from a decision of the Court to the Court of Appeal and to the Federal Court:
>
> **Provided that where the decision comprises an award of compensation there shall be no appeal therefrom.** (emphasis added)

[35] Learned counsel for the respondent had relied on *Syed Hussain Syed Junid* (*supra*) as authority for the proposition that the appeal is primarily against the additional compensation awarded by the High Court. It must be noted that the appellant there had appealed to the Court of Appeal on the decision of the High Court with respect to quantum of compensation expressed as "additional compensation." This is clearly reflected in the notice of appeal lodged by the appellants against the decision of the High Court which reads as follows:

> **NOTIS RAYUAN**
>
> Sila ambil perhatian bahawa perayu-perayu/pemohon-pemohon yang ke 2, 4, 16, 17, 18, 26, 27, 35, 36 dan 38 dalam perkara di atas tidak berpuas hati dengan keputusan Yang Arif Pesuruhjaya Kehakiman TUAN MOHD ZAKI BIN ABDUL WAHAB yang diberikan di Mahkamah Tinggi Malaya di Kangar yang bersidang di Alor Setar **merayu kepada Mahkamah Rayuan Malaysia terhadap keseluruhan keputusan tersebut mengenai pampasan tambahan.**
>
> Bertarikh pada 23 Mei 2011

[36] Thus, the Federal Court had no compunction in holding as follows:

> [24] From the underlined passage it is clear that the appeal herein is against the amount of compensation awarded. In our considered view, the appeal herein is nothing more than an attempt to circumvent the salient provisions of ss. 40D and 49(1) of the LAA which precludes any party from appealing against the award of compensation.

[37] Therefore, the bar to appeal is not absolute for s. 49 allows all appeals "except" for those where the High Court's decision comprises an award of compensation. In other words, it is not a ground of appeal that the award is excessively high or inadequately low. The Federal Court in *Semenyih Jaya* (*supra*) at [155] has interpreted this provision to mean that "there is no bar to appeal; on questions of law." The Federal Court speaking through Zainun Ali FCJ observed as follows:

> [155] To sum up, the proviso to sub-s. 49(1) of the Act does not represent a complete bar on all appeals to the Court of Appeal from the High Court on all questions of compensation. Instead *the bar to appeal in sub-s. 49(1) of the Act is limited to issues of fact on ground of quantum of compensation. Therefore, an aggrieved party has the right to appeal against the decision of the High Court on questions of law.* (emphasis added)

[38] This was further reaffirmed recently in the Federal Court case of *Amitabha Guha & Anor v. Pentadbir Tanah Daerah Hulu Langat* [2021] 3 CLJ 1; [2021] 2 MLRA 19 where the compensation awarded by the High Court in a land acquisition matter was disputed on appeal. The Federal Court speaking through Vernon Ong FCJ at paras. [45] and [46] of the judgment held that:

> [45] Section 49 provides that any person may appeal from a decision of the High Court to the Court of Appeal and to the Federal Court. However, it is important to note that the appeals must not relate to a decision which comprises an award of compensation: see proviso to s. 49(1). To underscore the finality of decisions on compensation, it is further stipulated that there shall be no further appeal on the matter: see s. 40D(3). Insofar as the High Court's decision is a decision on compensation, that there shall be no appeal to the Court of Appeal is acknowledged by sub-s. 68(1)(d) of the CJA 1964 which stipulates in clear and unequivocal terms that no appeal shall be brought to the Court of Appeal where, by any written law for the time being in force, the judgment or order of the High Court is expressly declared to be final (see also *Semenyih Jaya* (*supra*) at paras. [135]-[139] and [140]-[155]). What Is A Question Of Law?
>
> [46] **It follows from the preceding paragraph that appeals to the Court of Appeal and to the Federal Court may only be mounted on questions of law.** (emphasis added)

[39] Again in *Pentadbir Tanah Daerah Johor Bahru v. Nusantara Daya Sdn Bhd* [2021] 7 CLJ 1; [2021] 4 MLRA 466, a case involving an appeal on the ground that, the appeal to the Court of Appeal was incompetent under s. 49(1) of the LAA as it was an appeal against an increased compensation by the High Court, the said bar to appeal on the award of compensation was reiterated by Mary Lim Thiam Suan FCJ as follows:

A

> [58] Consistent with that approach, the circumstances and meaning of what may amount to a 'question of law' under the proviso to s. 49(1) must also be "narrowly and strictly construed"; that the definition must not be extensive as it would undermine the clear intent of the proviso to s. 49(1) – **that there is no right of appeal in respect of decisions comprising an award on compensation.** (emphasis added)

B

[40] If in answering the question of law raised, the award of compensation is increased or reduced, that is merely its unintended consequence and the appeal is not incompetent as such.

[41] Any objection to the appeal being incompetent as in that there is no C question of law raised that could be discerned from the memorandum of appeal, should more properly be raised at the substantive hearing of the appeal especially when the respondent raising it has a cross-appeal.

[42] It may be raised as a preliminary issue at the hearing of the substantive appeal as was observed in *Neoh Choo Ee & Co Sdn Bhd v. Vasalamany* D *Govindasamy & Anor* [2004] 3 CLJ 321; [2002] 2 MLRA 486 as follows:

> If upon reading the memorandum of appeal and the record of appeal as a whole the High Court comes to the conclusion that the appeal does not involve a question of law, then **it would no doubt deal with the point in the ordinary way, when the appeal is called on for hearing.** (emphasis added)

E

[43] Unless the objection raised is so patent that it would be a complete waste of time and energy to allow an appeal to proceed further, an attempt at striking out can only consume more of the court's time especially when the striking out is dismissed, requiring the parties to again prepare for the F appeal on the substantive merits of the appeal. It may even dissipate more time and energy when the dismissal is taken up on further appeal to the Federal Court as in this case, though we appreciate that it is the respondent's right to do so.

[44] Thus, even in the Federal Court's case of *Amitabha Guha* (*supra*) and G *Nusantara Daya* (*supra*), the objections by the respective respondents that were made pursuant to the proviso to s. 49(1) were made at the substantive appeal hearing at the Court of Appeal.

[45] In *Amitabha Guha* (*supra*), the respondent lodged a preliminary H objection at the hearing, while in *Nusantara Daya* (*supra*), the respondent took up his objection in the course of submissions at the appeal hearing.

[46] We agree with learned counsel for the appellant that a question of law under s. 49(1) is an issue that demands time for considered deliberation and it would thus be wise, on the facts of this case, to unpack this objection at I the substantive hearing of the appeal.

Whether The Questions As Stated In The Memorandum Of Appeal Are Questions Of Law For The Purpose Of The Appeal

[47] Learned counsel for the appellant submitted that the grounds of appeal as set out in his memorandum of appeal are not complaints against the High Court Judge's award of compensation. It was emphasised that in fact complaints were against the High Court Judge acting in excess of her jurisdiction or power. The grounds set forth in the memorandum of appeal are set out below:

Memorandum of Appeal

(1) The learned Judicial Commissioner erred in law when she exceeded her jurisdiction or power by awarding the respondent compensation for severance, which was not claimed by the respondent in its Form N of the Land Acquisition Act 1960.

(2) The learned Judicial Commissioner erred in law when she delivered her decision without recording, the respective written opinions of the assessors, in breach of s. 40C of the Land Acquisition Act 1960.

(3) The learned Judicial Commissioner erred in law in allowing the respondent's claim for damages for trespass.

(4) The learned Judicial Commissioner erred in law when she resolved to unelect for the respondent or supplanted the choice already made by the respondent with one of her own, despite having found the respondent to be bound by the doctrine of election in common law or in equity.

[48] Learned counsel for the appellant explained that for ground no. 1, it is a complaint against the High Court Judge acting in excess of her jurisdiction or power. The Federal Court, again in *Semenyih Jaya* (*supra*), ruled that such complaints by an appellant are unencumbered by the proviso to s. 49(1).

[49] Learned counsel for the appellant explained that with respect to ground no. 2, it is the appellant's complaint against non-observance by the High Court Judge of the protocols of s. 40C. The Federal Court in *Semenyih Jaya* (*supra*) at [173] and [178] to [180] categorically held that such non-observance taints the High Court Judge's decision and that such an award ought to be set aside as s. 40C is a mandatory provision; it is a peremptory order that must not be breached. It reads:

> [173] Thus by *s. 40C of the Act, the opinion of each of the assessors on compensation are to be made in writing and are to be recorded by the judge.* It is evident that the relevant provisions brought about by Act A999, attempted to strike an appropriate balance between finality of decision which bars appeals against quantum of compensation and the procedures for hearing described under the Act before the judge can arrive at an appropriate amount of compensation. The provisions in the Act serve to protect the rights and interests of interested persons in matters arising out of the compensation.

A …

[178] *We are of the view that non-compliance with s. 40C of the Act amounts to a misdirection which merits appellate intervention. In the present case, the court's decision appears to be incomplete in that although it was attested to by the assessors, it contains no opinion in relation to the decision, as envisaged by s. 40C of the Act.* The appellant's constitutional right to a fair and reasonable compensation arising from compulsory acquisition has been violated because the statutory safeguards to determine the amount of compensation awarded as stated in s. 40C of the Act was not complied with.

[179] Case laws have shown that breaches of peremptory orders would suffer the fate of it having to be set aside. In *Lee Ah Mok & Ors v. Pentadbir Tanah Daerah Seremban & Anor* [2008] 3 MLRA 377 for instance, the Court of Appeal held that an order made in contravention of s. 45 of the Act "was tainted" and ought to be set aside.

[180] Similarly, the contravention of s. 40C of the Act should attract the same legal repercussion, as s. 40C is a mandatory provision of the Act. (emphasis added)

[50] We see no good reason why the above questions are not question of law which are properly allowed in an appeal to the Court of Appeal on questions of law.

Whether The 'One-Day Late Service' Objection Of The Record Of Appeal Is Curable

[51] Rule 18(7) and r. 18(9) of the RCA do say as follows:

(7) The memorandum and copies referred to in subrule (4), which together shall be called the record of appeal, shall be filed at the Registry within ninety days from the date on which the decision appealed against was given.

…

(9) The appellant shall within the time limited for the filing of the record serve a copy thereof on each party who has been served with the notice of appeal.

[52] While all rules of the court are to be complied with, the law is not so inflexible as to bar completely an appeal merely because the service of the record of appeal is a day late. The court always has a discretion to extend or enlarge time for a minor non-compliance provided no serious prejudice had been caused. Thus, r. 93 of the RCA provides as follows:

93. Power of Court or Judge to enlarge or abridge time

The Court or a Judge shall have power to enlarge or abridge the time appointed by these Rules, or fix by an order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

> Provided that when the time for delivering any pleading or document or filing any affidavit, answer or document, or doing any act is or has been fixed or limited by any of these Rules or by any direction on or under the summons for directions or by an order of the Court or a Judge the costs of any application to extend such time and of any order made thereon shall be borne by the party making such application. (emphasis added)

[53] Here, the notice of appeal and record of appeal were both filed on time. The delay of one day in service of the record of appeal cannot be prejudicial to the respondent at all. The respondent was already conscious of the fact that there was an appeal filed.

[54] In fact, most solicitors would not even raise the objection of a one-day delay in service and many would not object to an application made to extend time to file the memorandum of appeal or to deem what had been filed and served to have been validly filed and served. Rule 94 of the RCA allows for enlargement of time by consent in writing, obviating the need to make an application to the court or a judge.

[55] Indeed, it would be disproportionate to dismiss the appellant's appeal based on his one-day delay in serving its record of appeal on the respondent especially when the respondent had filed its encl. 18 motion for enlargement of time to regularise that one-day late service, before his appeal has been set down for hearing.

[56] Under r. 18(7) of the RCA, the deadline to file and serve the record of appeal was on 4 August 2021 or 90 days from the date of the decision of the High Court on 6 May 2021. Unfortunately, it was served on as in received by the respondent's solicitors by POS Laju on Thursday, 5 August 2021, despite it having been posted eight days earlier on Tuesday, 29 July 2021. See: encl. 19 at p. 87 of the affidavit in support and in reply of the appellant affirmed by one Sufian Suleiman dated 13 October 2021.

[57] Learned counsel for the appellant had drawn our attention to the Arahan Ketua Hakim Negara Bil. 08/2021 that no objection as to time should be made where the time for doing something has been lost to the movement control order ("MCO") period which began from 1 June 2021.

[58] The respondent was not prejudiced as it had already been served with the record of appeal on 5 August 2021, some 53 days prior to respondent filing, on 27 September 2021, encl. 54 which is its amended motion to strike out the appellant's appeal.

[59] In *National Union Of Bank Employees v. Director General Of Trade Unions & Anor* [2013] 7 CLJ 957; [2013] 6 MLJ 167 at para. [27], Justice Arifin Zakaria CJ said:

A

> [27] … In the present appeal, **the application for extension of time was made before the hearing for the judicial review application** and the **respondents were not prejudiced by this application as they had been duly served with all the cause papers prior to the application itself.** In exercising its discretion, the court must have regard to justice. This is in line with the provision in O1A of the RHC (see *Maxwell v. Keun* [1928] 2 KB 645; *Walker v. Walker* [1967] 1 WLR 327). (emphasis added)

B

[60] In the present case, the appellant had entrusted the service of the appeal record to the POS Laju Malaysia eight days earlier and possibly because of the pandemic, it was unfortunate that the postal authority took more than eight days to deliver it to an office not more than 20km away.

C

[61] Following the case of *Scott & English (M) Sdn Bhd v. Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors* [1994] 3 CLJ 114; [1994] 2 MLJ 424 in taking into consideration the factors such as the reasons for the delay, the length of the day, the chances of the appeal succeeding and the prejudice if any suffered by the respondent, we have no hesitation in granting the enlargement of time of one day prayed for.

D

[62] Even for a longer delay, the Supreme Court in *Lee Guat Eng v. Tan Lian Kim* [1985] 1 LNS 26; [1985] 2 MLJ 196 had allowed an extension of time of 21 days for the late service of the record of appeal on the respondent; the notice of appeal and the memorandum of appeal having both been filed on time.

E

[63] We note that the UK Court of Appeal in *Palata Investments Ltd & Ors v. Burt & Sinfield Ltd & Ors* [1985] 2 All ER 517 at p. 521 had observed as follows:

F

> ... we expressed the opinion that, in cases *where the delay was very short and there was an acceptable excuse for the delay, as a general rule the appellant should not be deprived of his right of appeal and so no question of the merits of the appeal will arise.* We wish to emphasise that the discretion which fell to be exercised is unfettered, and should be exercised flexibly with regard to the facts of the particular case. No doubt in some cases it may be material to have regard to the merits of the appeal, because it may be wrong, and indeed may be an unkindness to the appellant himself, to extend his time for appealing after he has allowed the time to elapse, to enable him to pursue a hopeless appeal. But this is not such a case. (emphasis added)

G

H

[64] In the duel of litigation, it is magnanimous to be gracious to each other for then the appeal could be fought on merits rather than having won on a technicality. After all the sword we wield is not that of an assassin but that of a gladiator.

[65] While not everything we do here in life may echo in eternity, yet a kind act is always recognised and remembered. Often in life and in legal battle, the most important thing may not be to have won but to have fought well.

I

Whether The "Memorandum Of Appeal" Had Failed To Comply With r. 18(1) Of The Rules Of The Court Of Appeal

[66] The respondent claimed that the memorandum of appeal is too general or "terlalu am" and thus not in compliance with r. 18(1), and therefore, this appeal should be struck out.

[67] We find merits in the appellant's argument that all three elements required by r. 18(1) – namely, (i) the head of objection and (ii) the ground of objection and (iii) the point of law wrongly decided by the High Court Judge are all reflected in each ground of appeal in the memorandum of appeal. For ground of appeal no. 1, the head of objection concerns jurisdiction or power; the ground is that the High Court Judge acted in excess of it; the point of law concerns Form N.

[68] As for ground of appeal no. 2, learned counsel for the appellant submitted that the head and ground of objection are the protocol for assessors and breach of procedure respectively; whilst the point of law revolves around the construction of s. 40C of the LAA.

[69] It hardly lies in the mouth of the respondent to say that the grounds of appeal are too vague and general as it had no problem filing its notice of cross-appeal. A cross-appeal is after all, an appeal on precisely the same point that the appellant is appealing on except that an opposite result is argued by the respondent instead.

[70] The feigning of ignorance would not find favour with the court. In *Tan Kim Beng & Ors v. Datuk Yen Ying Pang & Ors* [2012] 1 LNS 1307; [2013] 4 MLJ 437 the Court of Appeal dismissed, pursuant to r. 1A of the RCA which is titled "1A. Court or judge shall have regard to justice", an identical objection raised since the respondent there never averred that it had problem understanding the grounds of appeal. The Court of Appeal held:

> [13] We note that the objection is that of non-compliance with r. 18(1) in not specifying the error of law or of fact. It is not in the respondent's submission that the respondent was unable to understand the point raised and therefore unable to answer it, thereby occasioning an injustice to the respondent. We conclude, therefore, that the objection is purely upon a technicality, and not because such non-compliance occasions a substantial miscarriage of justice to the respondent as required by r. 1A of the Rules of the Court of Appeal which provides:
>
> > A Court or Judge shall not allow any preliminary objection by any party only on the ground of non-compliance of any of these Rules unless the Court or Judge is of the opinion that such noncompliance has occasioned a substantial miscarriage of justice.
>
> [14] In simpler language, the Rules are intended as the means to justice and not to be put ahead of it. We stress that the Rules are to be prevailed upon and applied solely to advance the cause of justice and to prevent

A miscarriage of justice, and not to be used merely as accessories in a martial arts dance. It wastes valuable time and defeats the primary purpose of a fair and just resolution of the matter between the parties.

[71] Likewise, in the instant case, the respondent had never claimed in its affidavits that it was unable to comprehend the grounds of appeal in the B memorandum of appeal. More importantly the respondent had not alleged, let alone shown, that it has suffered a substantial miscarriage of justice, as required under r. 3A of the RCA which reads:

3A. Preliminary objection on the ground of non-compliance shall not be allowed

C A Court or Judge shall not allow any preliminary objection by any party only on the ground of non-compliance of any of these Rules unless the Court or Judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice. (emphasis added)

[72] Even if this court is inclined to find that the memorandum of appeal D is indeed too general, we would nevertheless allow the appellant to amend the memorandum of appeal for it would be disproportionate to order the appeal to be struck out in the circumstances of the case where the respondent had no problem filing in their notice of cross-appeal. See: the Court of Appeal's decision in *Muniandy Subrayan & Ors v. Chairman And Board* E *Members Of Koperasi Menara Maju Bhd* [1997] 1 CLJ 417; [1997] 1 MLJ 557 at 560H in a similar approach to amendment of pleadings.

[73] However, we do not find such a decision to be necessary as the memorandum of appeal is sufficiently clear in setting the questions of law that constitute the grounds of appeal.

F *Whether The Decision Of The High Court Has Complied With s. 40C Of The LAA*

[74] According to the respondent, the appellant's (Pentadbir Tanah Johor Bahru) appeal is devoid of merit since the assessors have furnished their respective opinions on 21 September 2021.

G **[75]** It is mandatory for assessors to provide their respective written opinions to the High Court Judge presiding over the land reference before the judge delivers his decision. This requirement is housed in s. 40C of the LAA.

[76] The assessors must do so before the judge delivers his decision. H According to the Federal Court in *Semenyih Jaya* (*supra*) at [187], s. 40C demands transparency in the judge's decision-making process. The opinions must be recorded by him and he must be satisfied that the assessors have considered all pertinent matters before deciding. He must then inform the parties what was the advice that he received from the assessors. The bar to appeal in the s. 49(1) proviso does not operate when s. 40C is not complied I with (see *Semenyih Jaya* (*supra*) at [182]).

[77] The Federal Court in *Semenyih Jaya* (*supra*) unequivocally ruled at [189] that non-observance of s. 40C is tantamount to a misdirection by the High Court, thus rendering its decision invalid. The relevant paras. [182] and [187] to [189] of the judgment are set out below:

> [182] Thus, in cases where there is failure to observe the procedure as set out in the Act as in the instant appeal, there is a breach of the safeguards provided for in art. 13(1) of the Federal Constitution, of the principle couched therein, which is "save in accordance with law". *Can appeals be limited if there is non- compliance with s. 40C of the Act? The answer must be in the negative. The bar to appeal in subsection 49(1) does not operate when there is non-compliance with the statutory provisions of the Act.*
>
> …
>
> [187] The importance of s. 40C of the Act also lies in the transparency of the decision-making process. In the words of Viscount Simon LC in *Richardson v. Redpath, Brown & Co Ltd* (*supra*):
>
> > It would seem desirable in cases where the assessor's advice, within its proper limits, is likely to affect the judge's conclusion, for the latter to inform the parties before him what is the advice which he has received.
>
> The opinion of the assessors serves to inform the interested persons that the court has considered all issues brought before the court and sought professional views before arriving at its decision. *The provision in s. 40C of the Act is also significant in view of the bar to appeal provided for in subsection 49(1) of the Act.*
>
> [188] The written opinion of the assessors also serves to facilitate the appellate courts in the event an appeal is filed. The advice given by the assessors in the High Court must be made available to the appellate courts.
>
> [189] In conclusion, s 40C of the Act forms an important component of the decision-making process in land reference proceedings. It sets out the requirements to be observed by the assessors and the Judge before decision is arrived at. Therefore, *non-observance of s 40C of the Act amounts to a misdirection of the court which renders the decision invalid. Suffice to say that for this reason alone, this appeal must be allowed.* (emphasis added)

[78] Learned counsel for the appellant submitted that case law and Arahan Amalan Hakim Besar Malaya 01/2017 has set out the following further stipulations and repercussions:

(i) that the opinions are to be given to the judge at the conclusion of proceedings: *Semenyih Jaya* at [118];

(ii) that each assessor must state the appropriate amount of compensation in their written opinions: *Semenyih Jaya* at [119];

(iii) that it would be prudent for the judge to attach those opinions to his grounds of judgment, as was done in *Shahrum Hj Kazindin v. Pentadbir Tanah Daerah Petaling, Selangor* [2019] 1 LNS 622; [2019] MLJU 1376 at [21];

(iv) that a decision signed by the judge and the assessors is insufficient without the judge also recording the assessors' opinions: *Siaw Swee Mie v. Lembaga Lebuh Raya Malaysia* [2018] 4 CLJ 196; [2019] 4 MLJ 406 at [44] to [45];

(v) that the High Court's decision is invalid and the entire land reference proceeding before it is vitiated if s. 40C is not observed: *Semenyih Jaya* at [189] and *Siaw Swee Mie* at [46];

(vi) that the assessors have no more role to play after giving their opinions: *Semenyih Jaya* at [122];

(vii) that an appellate court must intervene where s. 40C is not complied with. At any rate, an appeal against non-observance of s. 40C cannot be barred and must be heard: *Semenyih Jaya* at [178] to [180], [182], [186] to [187] and [224(b)]; and

(viii) that the role of assessors gained tremendous significance following the introduction of s. 49(1) proviso *via* Act 486 limiting the right of appeal. Consequently, the assessors' opinions are vital and the requirement for a judge to be guided by them is warranted by law as a judge is no expert in land valuation: *Nusantara Daya* (*supra*) at [55].

[79] Learned counsel for the appellant submitted that the High Court Judge's decision of 6 May 2021 Order has to be set aside as s. 40C was not observed in the instant case in the following:

(i) there was no written opinion rendered by either assessor prior to the judge delivering her decision on 6 May 2021;

(ii) the brief decision at p. 21 encl. 4 appeal record signed by the judge and assessors does not suffice under s. 40C. See: *Siaw Swee Mie* at [44] to [45];

(iii) the opinions were only drawn up by the assessors and filed in the High Court on 21 September 2021 as encl. 43 and 44 well over four months after the 6 May 2021 order or decision: see: pp. 11 to 20; pp. 9 to 10 of encl. 16 supp appeal record;

(iv) the judge's grounds of judgment thus, became a guide for those opinions instead of the other way around, thereby making a mockery of s. 40C of the LAA 1960 – it begs the question who advised who. See *Amitabha Guha* at [50] and *Nusantara Daya* at [56]; and

(v) the compensation awards cannot therefore be securely tested to determine if they are well founded, more so here where the assessors were in agreement and the judge purportedly accepted their opinions in *toto*. See: [41] grounds of judgment.

[80] We agree that the question as to what is sufficient compliance with s. 40C and the effect of non-compliance is a question of law that should properly be heard at the substantive appeal. The respondent's striking out application is thus without merit and misconceived.

Whether The Non-inclusion Of The "Judge's Notes" Is Fatal Such That The Appeal Ought To Be Struck Out

[81] The "judge's notes of the hearing" may under r. 18(4)(b) of the RCA consist of notes recorded by:

(i) wholly mechanical means, or

(ii) partly by mechanical means and partly in handwritten form, or

(iii) wholly in handwritten form.

[82] Rule 18(4)(b) reads:

> Memorandum of appeal
>
> …
>
> (4) The appellant shall attach to such memorandum copies of the proceedings in the High Court, including:
>
> …
>
> (b) a copy of the Judge's notes of the hearing of the cause or matter in which the decision appealed against was given which may be recorded wholly or partly by mechanical means.

[83] Learned counsel for the respondent contended that the appellant had also failed to attach in the records of appeal the duly transcribed notes of proceeding or if it is not available, to attach the same in CD form as required under para. 7.2 (Penyediaan Rekod Rayuan bagi Kandungan Bahagian B no. (ii) Arahan Amalan Mahkamah Rayuan Bil. 1 Tahun 2017 which reads in its original language as follows:

> Transkripsi nota keterangan Mahkamah Tinggi. Jika transkripsi nota keterangan tldak dapat difailkan atau tidak tersedia, nota keterangan dalam bentuk cakera padat (Compact Disc/CD) boleh difailkan tertakluk kepada arahan Mahkamah

[84] The respondent also alleged that the appellant had not provided any evidence to show that it had applied for the notes of proceedings to be transcribed or that it had tried to obtain the court direction to file the same in CD's form.

[85] To be fair to the appellant, it had written to the judge's secretary for the "judge's notes of the hearing" and the answer is that the "judge's notes of the hearing" is the same as the grounds of judgment already given to the parties and so there is no payment needed from any parties for the "judge's notes of the hearing". The reply from the judge's secretary at p. 25 encl. 57 affidavit says it all. In its original language it reads:

> 2. Untuk makluman pihak puan setelah perkara ini diangkat dan dipanjangkan kepada Yang Arif Puan Evrol Mariette Peters selaku hakim yang mendengar kes tersebut, adalah disahkan bahawa nota yang disediakan oleh Yang Arif sendiri adalah sama dengan Alasan penghakiman sebagaimana yang telah diberikan kepada pihak-pihak. Oleh yang demikian tiada bayaran bagi mana-mana peguam untuk kes tersebut di atas mendapatkan nota yang disediakan oleh Yang Arif.
>
> Sekian untuk makluman jua. Terima kasih.

[86] We agree with learned counsel for the appellant that under the Arahan Amalan Mahkamah Rayuan 01/2017 ("AAMR 01/2017"), the "judge's notes of hearing" is not required as para. 7.2 of "Bahagian III: Rekod Rayuan dalam Rayuan Sivil" only the following are now required by AAMR 01/2017 to be incorporated in every appeal record:

(i) index;

(ii) chronology;

(iii) memorandum of appeal;

(iv) judgment;

(v) notice of appeal;

(vi) grounds of judgment;

(vii) pleadings; and

(viii) notes of evidence or affidavits (depending on whether the appeal is after a full trial).

[87] We find merits in the appellant's argument that "the judge's notes of the hearing" are inapplicable in the instant case as they are only applicable to appeals after a full trial with *viva voce* evidence which is not the case here: see Arahan Amalan Mahkamah Rayuan 02/2011.

[88] Even assuming for a moment that "the judge's notes of the hearing" are required, it is still not fatal to the appellant's appeal as the reasons set about in "the judge's notes of the hearing" would have already been incorporated into the judge's grounds of judgment unless it can be shown that the reasons given as reflected in "the judge's notes of hearing" are different from the GOJ subsequently made available.

[89] Learned counsel for the respondent submitted on the importance of adhering strictly to RCA and the Practice Directions and referred to the case of *Low Cheng Soon v. TA Securities Sdn Bhd* [2003] 1 CLJ 309; [2002] 2 MLRA 298 where the Court of Appeal upheld a preliminary objection raised by the respondent on the non-compliance of RCA and the Practice Directions in relation to the filing of the record of appeal as follows:

> [24] In our judgment, the importance of the Rules of Court cannot be ignored as otherwise the courts will be faced with endless problems involving the administration of justice. Speaking of the importance of the Rules of Court, the learned judge, Chang Min Tat J (as he then was) in *Yu Oi Yong & Anor v. Ho Toong Peng & Ors* [1976] 1 MLRH 335; [1977] 1 MLJ 120 had this to say (at p 121):
>
> > There should, in my view, be some adherence to the rules of court, unless required by circumstances, if there is to be any meaning or purpose in such rules.
>
> It should, I think, be realised by practitioners as well as by judges that while strict and slavish adherence to forms and rules can sometimes hinder the administration of justice, these forms and rules should not be disregarded for no reason whatsoever, since they embody the experience of the courts over the years in the cause of speedy and efficient administration of justice.
>
> [25] In *Chua Choong Yin v. Tan Boon Bak Trading Sdn Bhd & Anor* [2002] 1 MLRA 199; [2002] 4 MLJ 145; [2002] 3 CLJ 357; [2002] 3 AMR 3023 the Court of Appeal was faced with similar issues. There the respondent raised two preliminary issues namely non-compliance by the appellant with:
>
> (i) Practice Direction No 3 of 1992; and
>
> (ii) Rules 18(4)(c) and (6) of the Rules of the Court of Appeal 1994 ('the Rules').
>
> [26] Speaking through Siti Norma Yaacob JCA (as she then was) this is what the court said with respect to the first issue (at p 363):
>
> > Whilst we appreciate that practice directions do not have the force of law, they are created for a specific purpose, namely to regulate a systematic and consistent procedure governing the filing of appeal records. For that reason, they have to be adhered to otherwise chaos and uncertainty in the filing of appeal records shall prevail. See the cases of *Yeo Yoo Teik v. Jemaah Pengadilan Sewa, Pulau Pinang & Anor* [1995] 2 MLRA 349; [1996] 2 MLJ 54; [1996] 2 CLJ 628; [1996] 2 AMR 1399 and *Ling Siok Seng v. Ting Sieh Chun*g [1998] 1 MLRA 548; [1998] 4 MLJ 65; [1998] 4 CLJ 169; [1998] 4 AMR 3217. 302 [2002] 2 MLR.

A [27] In dealing with the second issue the court there found that the appellant was in clear breach of r. 18(4)(c) of the Rules when he included in his appeal records two prohibited (under court order) exhibits. The solicitors for the first respondent, by letter, pointed out to the appellant that the inclusion of the said exhs in his index of documents was in defiance of the court order but despite being put on notice, the appellant B insisted on including the offending two exhs and the fact of the first respondent's objection does not appear in the appeal records as required under r. 18(6) of the Rules.

[90] We have not the slightest doubt as to the correctness of the above proposition. However, we must always bear in mind the overarching C consideration of justice. The default position is encapsulated in r. 3A "preliminary objection on the ground of non-compliance shall not be allowed" and in the opening paragraph of r. 102 of the RCA. As follows:

102. Non-compliance with Rules not to render proceedings void.

D **Non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void** unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit. (emphasis added)

E **[91]** No prejudice or substantial injustice has been shown which is not curable. The defect was thus curable under r. 102 of the RCA. Steve Shim CJSS in *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645; [2002] 1 MLJ 385 at p. 666 (CLJ); p. 405 (MLJ) had the occasion to observe as follows:

F However, *had the Court of Appeal considered r. 102 of the RCA*, it would have taken note of the following salient facts; *that there was no dispute as to the contents of the order appealed against;* that the appellant had already filed and served the appeal record containing the photocopy of the sealed order; that the authenticity of the photocopy of the sealed order was not in G dispute; that the appellant had also filed and served the supplementary appeal record containing the certified true copy of the sealed order and in addition, the appellant had tendered a certified true copy of the sealed order at the hearing of the appeal in open court. *Given those factual circumstances, it would have concluded that the respondent had neither been misled nor prejudiced in any way notwithstanding the defect. There was no substantial* H *miscarriage of justice involved.* That being the position, the defect was certainly curable under r. 102 of the RCA. *The Court of Appeal's failure to consider r. 102 had adversely affected its decision in upholding the objection of the respondent.* On that basis, its decision was therefore flawed resulting in injustice to the appellant. (emphasis added)

I

[92] We must always bear in mind that the rules of procedure are the handmaidens of justice and not the mistress of justice. They are there to facilitate the process of the appeal in this case and not to frustrate it for every minor infraction of the rules and more so, when in this case, through no fault of the appellant, it had not been furnished with the "judge's notes of the hearing." The rules of procedure are to be subordinated to the substantive justice of the case for they were introduced to ease and assist the litigants, not to trip and trap them.

[93] That is the whole tone and tenor of r. 3A and r. 102 of the RCA, setting the thrust for the trajectory of an appeal such that a preliminary objection on the ground of non-compliance shall not be allowed to derail its course unless there has been a substantial miscarriage of justice.

[94] In a similar vein, Mohtar Abdullah FCJ in *Megat Najmuddin* (*supra*) preferred to promote the prophylactic properties of the rules of procedure at pp. 689 to 690 (CLJ); p. 426 (MLJ) as follows:

> It is very clear from these provisions of the RCA that the relevant documents, including the copy of the court order dated 20 October 1998 (the order appealed against) must be filed by the appellant within six weeks after the entry of the appeal or 'within such further time as the court may allow' which means, of course, that the appellant must apply to the Court of Appeal for leave to file the relevant document out of time. In short, on the facts of the present case, the appellant who has filed everything in time, except for that copy of the court order, must apply to the court for leave to file the said court order out of time. Rules are rules! They must be obeyed. Numerous judgments can be cited in support of this firm stand on the necessity for a strict adherence to the rules. I agree. However, *a judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blinkered fixation on technicalities of the rules and the cold letter of the law. The judge should be mindful of r. 102 of the RCA which provides that 'non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void.' The said rule also provides for the discretionary power of the judge to deal with such irregularity 'in such manner and upon such terms' as the judge thinks fit.* Therefore, a fair minded judge should look at all the circumstances of the case before penalizing the party who infringes any particular rule of procedure. After all, r. 18(7) of the RCA itself provides an avenue for the appellant to apply to the court for an extension of time. If the appellant fails to do so, he should not be peremptorily dismissed. The court should consider why the appellant acted in the manner he did. In this case, the appellant was relying on the Court of Appeal's own practice direction which allows alternative procedures for the filing or submission of the copy of the court order. The Court of Appeal should properly examine its own practice direction and consider the matter in the light of the RCA as modified by the practice direction. (emphasis added)

[95] Learned counsel for the respondent had also relied on Nota Amalan 02/1991 erroneously stated as Arahan Amalan 02/1991. Nota Amalan 02/1991 says as follows:

(i) an appellant must file his appeal record within six weeks;

(ii) if he anticipates having to apply for an extension of time, he must within one week from filing his notice of appeal write to the High Court for notes of evidence;

(iii) if those notes remain unavailable four weeks after he filed his notice of appeal, he shall apply by letter to the Supreme Court for extension of time;

(iv) the Supreme Court may then grant a three-week extension from the time those notes are received by him;

(v) if no application is made to the Supreme Court as at (iii) above, the Supreme Court may take that omission into consideration when deciding whether or not to grant an extension of time upon a motion being filed; and

(vi) the appeal record must still be filed even in the absence of the grounds of judgment.

[96] It was issued by the then Supreme Court and it was concerned with applications for extension of time to file record of appeal in civil appeals. However, it had already ceased to have any force after it was repealed by Arahan Amalan Mahkamah Persekutuan 01/2018.

[97] The current r. 18 of the RCA on memorandum of appeal reads as follows:

> 18. Memorandum of appeal.
>
> (1) The appellant shall prepare a memorandum of appeal setting forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided; such grounds to be numbered consecutively.
>
> (2) The appellant shall not without the leave of the Court put forward any other ground of objection, but the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant.
>
> (3) The memorandum of appeal shall be substantially in Form 3 in the First Schedule.
>
> (4) The appellant shall attach to such memorandum copies of the proceedings in the High Court, including:
>
> (a) copies of the documents in the nature of pleadings, so far as is necessary for showing the matter decided and the nature of the appeal;

(b) a copy of the Judge's notes of the hearing of the cause or matter in which the decision appealed against was given which may be recorded wholly or partly by mechanical means;

(c) copies of all affidavits read and of all documents put in evidence in the High Court so far as they are material for the purposes of the appeal, and subject to rule 101 if such documents are not in the national language, copies of certified translations thereof;

(d) a copy of the judgment, decree or order appealed from;

(e) a copy of the written judgment or grounds of decision of the Judge, or a copy of the agreed notes of judgment as prepared by the parties and approved by the Judge, if such written judgment, grounds of decision or agreed notes as approved is made available within the time limited for filing the record of appeal; and

(f) a copy of the notice of appeal.

…

(7) The memorandum and copies referred to in subrule (4), which together shall be called the record of appeal, shall be filed at the Registry within ninety days from the date on which the decision appealed against was given.

(7A) Notwithstanding subrule (7), *if any copy of the documents specified in paragraph (4)(b), (d) or (e) is not available within ninety days from the date on which the decision appealed against was given, the appellant shall file the copy of the documents together with the memorandum of appeal as supplementary records of appeal within three weeks of being notified of its availability.*

(7B) Notwithstanding subrules (7) and (7A), if any copy of the documents specified in *paragraph (4)(b) or (e) is not available after ninety days from the date on which the decision appealed against was given, the court may order the appellant to proceed with his appeal.* (emphasis added)

[98] This court has a discretion in ordering and we so order that the appellant do proceed with the appeal without the "judge's notes of the hearing" as the High Court had already stated that the judge's notes of the hearing are the same as the grounds of judgment furnished by the judge.

[99] Learned counsel for the respondent cited yet another case in *Joseph Lee Yok Min v. Mayban Securities Sdn Bhd & Anor* [2014] 3 CLJ 285; [2018] 6 MLRA 458 where the non-compliance with the RCA was fatal but that was in the context of serious non-compliance with respect to the absence of the notes of proceedings, the grounds of judgment and the sealed order of the court. In the face of such serious breaches and the lack of an explanation to excuse the non-compliance, the Court of Appeal in dismissing the appeal observed as follows:

A [7] On the second issue, there can be no doubt that the Record of Appeal is incomplete as it does not contain:

(i) notes of proceedings;

(ii) grounds of decision; and

B (iii) sealed order dated 12 January 2006.

[8] The appellant has not shown any proof that he had applied for the three items above. According to Practice Direction No 2 of 1991, one week after the notice of appeal is filed, the appellant has to apply to the judge's secretary to be supplied with a copy of the notes of proceedings. In the circumstances, in our judgment, the non-compliance with the Practice C Direction and r. 18(4) (b), (d) and (e) of the Rules of the Court of Appeal 1994, **where copy of the judgment appealed from, notes of proceedings and grounds of judgment was not included in the Record of Appeal, was not an irregularity but a nullity** (see: *Chuah Tim Lan v. RHB Bank Bhd & Anor* [2008] 2 MLRA 265 and *Capital Insurance Bhd v. Kasim Mohd Ali* D [1999] 1 MLRA 572).

[9] For reasons aforesaid, the 1st respondent's preliminary objection was upheld. We held that **the Record of Appeal is defective; it tantamount to no record of appeal having being filed. On this ground alone, this appeal must be dismissed with costs.** (emphasis added)

E **[100]** At any rate, the application of Nota Amalan 02/1991 must be confined to situations where an appellant is applying for extension of time to file a supplementary appeal record which is not the case here. For the respondent to insist on the appellant filing what it does not have because the High Court had not seen fit to furnish it, would be to ask the appellant to F do the impossible and clearly the RCA does not require that.

Whether The Objection On The Ground That "Separate Volumes" Of Appeal Record Were Not Filed Is Valid In The Circumstances Of The Case

[101] Paragraph 7.1(a) of the AAMR 01/2017 provides in its original language as follows:

G

Perayu hendaklah menyediakan 4 salinan Rekod Rayuan seperti yang berikut:

(a) bagi rayuan daripada Mahkamah Tinggi, Rekod Rayuan hendaklah terbahagi kepada Bahagian A, Bahagian B and Bahagian C; dan …

H **[102]** Paragraph 7.3 (a) to (e) of the AAMR 01/2017 provides in its original language as follows:

7.3 Bahagian A, B, C dan D hendalah seperti yang berikut:

(a) dibahagikan kepada 3 Jilid dan dinyatakan:

I

JILID	BAHAGIAN
1	A
2	B dan C
3	D

(b) setiap Jilid tidak boleh melebihi 200 muka surat;

(c) jika mana-mana Jilid melebihi 200 muka surat, setiap Jilid hendaklah dibahagikan dan dinyatakan sebagai contohnya Jilid 2A, 2B dll. Setiap Jilid hendaklah mempunyai indeks yang jelas dan terperinci;

(d) setiap muka surat yang dinomborkan hendaklah disusun secara berturutan bermula daripada muka surat pertama di Jilid 1; dan

(e) jika jumlah muka surat bagi Rekod Rayuan adalah kurang daripada 50 muka surat, kesemua tiga Jilid boleh digabungkan menjadi satu Jilid sahaja yang mengandungi Bahagian, A, B, C dan/atau D.

[103] It goes on to say at para. 7.3 that Bahagian D is irrelevant for our instant case as that is only meant for appeals from the Sessions Court.

[104] Reading (b), (c) and (e) above, there may well be situations where Parts A and B and C may be merged, whether into one or more volumes. The implication is that there is no rigid or inflexible precept that requires Part A to be separated from Parts B and C. Neither is there any prohibition against Part B being compiled in a volume separate and distinct from Part C.

[105] What the appellant had done is to merely merge Part A and Part B and (a few documents from) Part C in the volume: see: encl. 4 appeal record. The reason the appellant did so was because Part A only had 15 pages, while Part B had none. The appellant incorporated 186 pages from Part C into that first volume that had Part A (27 pages) and Part B (nil).

[106] We cannot see how the appellant's chosen method of compilation is fatal to its appeal. The respondent had not objected to this compilation upon being served with the appeal record. The respondent, on the other hand, had taken several fresh steps in filing the following:

(i) notice of cross-appeal in encl.7;

(ii) motion in encl. 14 motion and three affidavits and two written submissions;

(iii) filed four written submissions and three affidavits to oppose the appellant-Pentadbir Tanah's encl. 12 and encl. 18 motions.

[107] All these steps were taken well before the respondent filed its present encl. 54 amended motion to object to that irregularity. Taking fresh steps after knowing of the irregularity is fatal to the respondent's application to strike out the notice of appeal. Rule 103 of the RCA reads as follows:

> **103. Application to set aside for irregularity when allowed**
>
> No application to set aside any proceedings for irregularity shall be allowed unless made **within reasonable time,** nor if **the party applying has taken any fresh step after knowledge of the irregularity.**
>
> (emphasis added)

[108] The objection is frivolous and without merits and hence dismissed.

Whether The Respondent's Notice Of Cross-Appeal Should Be Struck Out

[109] The appellant in encl. 18 when praying for an enlargement of time to serve the record of appeal which was found to be late by one day, had also prayed for the respondent's notice of cross-appeal in encl. 7 to be struck out. Perhaps it was more of a strategic move by the appellant in that if its notice of appeal is struck out then the respondent's notice of cross-appeal ought to be struck out as well; a case of the best defence is an offence.

[110] However, the desire to live and to keep the appeal alive was stronger than the dire consequence of having the life in the appeal being snuffed out. Sensing perhaps that the court would be quite prepared to allow the enlargement of time, learned counsel for the appellant was prepared to withdraw the second prayer after it was pointed out that the two prayers being distinct from each other, the proper procedure would be to file a separate application for the striking out of the notice of cross-appeal.

[111] The considerations for enlargement of time under r. 93 of the RCA are quite different from that of striking out a notice of cross-appeal and hence, undesirable to lump two separate applications to be lumped into one application. See: the Court of Appeal case of *Jacy Tintang & Anor v. Mayan Nayang* [2022] 7 CLJ 682; [2022] MLJU 1491 at para. [59].

> [59] It is also germane to observe and it is also not disputed that *the appellants had filed in one application seeking to be made codefendant pursuant to Order 89 rule 5 and at the same time made an application to intervene under Order 15 rule 6 of the ROC 2012. It is trite that the requirements for each application are different.* The requirements for an application to intervene under Order 89 rule 5 are separate from that of an application under Order 15 rule 6. Under Order 15 rule 6 requires the appellants to have legal interest. *We are of the view that given the different legal consideration that underlies each application it is undesirable for two separate applications to be lumped into one notice of application.* (emphasis added)

[112] The considerations for enlargement of time would be whether the delay of one day in service of the record of appeal would cause any substantial injustice to the respondent whereas that of striking out the notice of cross-appeal would be whether it is connected to the findings and decisions appealed against by the appellant and not a case where it seeks to reverse or set aside the said findings or decisions.

[113] We had therefore dismissed the prayer in encl. 18 to strike out the notice of cross-appeal. There has been no appeal by the appellant on this decision of the court. Be that as it may, we would like to make some observations which may help to clear some misconceptions on the true nature of a notice of cross-appeal and its effect if the notice of appeal of the appellant is withdrawn or struck out.

[114] The respondent in its notice of cross-appeal had raised the following:

(i) that the High Court ought to have awarded interest at 8% per annum instead of 5% per annum;

(ii) that the High Court was wrong to award a nominal sum of RM10 for land already earmarked as road reserve, measuring 2,989.89m^2; and

(iii) that the High Court was wrong to award RM1.1m for injurious affection compensation for 2,669.93m^2 when the respondent had claimed RM6.8m (or RM6.3m plus RM512,000) for 3,264.93m^2.

[115] To recap and recall, the above questions of law do not seek to vary what the appellant had raised in its memorandum of appeal. The memorandum of appeal had raised the following:

(i) the lack of jurisdiction or power of the High Court in awarding the respondent compensation for severance, which was not claimed by the respondent in its Form N of the Land Acquisition Act 1960;

(ii) the fatal non-compliance with the strict procedure under the LAA in that the High Court's decision was delivered without recording the respective written opinions of the assessors, in breach of s. 40C of the LAA;

(iii) the error of law in allowing the respondent's claim for damages for trespass; and

(iv) the error of law when High Court resolved to unelect for the respondent or supplanted the choice already made by the respondent with one of its own, despite having found the respondent to be bound by the doctrine of election in common law or in equity.

[116] It can thus be seen that the respondent's grounds of cross-appeal do not relate to and indeed are unconnected to the grounds of appeal of the appellant as evident in its memorandum of appeal. As such the respondent should have filed its own separate notice of appeal on time and not a notice of cross-appeal.

[117] In *Pengerusi Suruhanjaya Pilihanraya Malaysia v. See Chee How & Anor* [2015] 8 CLJ 367; [2015] MLJU 1831 the Court of Appeal explained that:

> [77] … a cross-appeal is only meant for *variation of "the decision" appealed against and not for variation, reversal or setting aside of any other decision of the High Court unrelated to the appeal filed by the appellant.* (emphasis added)

[118] The seminal case on this minefield of error arising out of a misconception as to the true nature of a notice of cross-appeal is the Federal Court case of *Kabushiki Kaisha Ngu v. Leisure Farm Corporation Sdn Bhd & Ors* [2016] 8 CLJ 149; [2016] 5 MLJ 552. The plaintiff there had appealed against the High Court's order to grant damages instead of a prayer for specific performance even though it had held that the sale and purchase agreement of a golf course land was a valid agreement between the first and second defendant and that the third defendant was not a *bona fide* purchaser. The plaintiff was aggrieved by the decision of an award of damages and they appealed on ground that they should be entitled to specific performance. The first defendant filed a cross-appeal by which it intended to reverse the entire decision of the High Court.

[119] Before the Court of Appeal, the plaintiff/appellant raised a preliminary objection against the first defendant's appeal. The plaintiff argued that the effect sought by way of the first defendant's cross-appeal was to set aside the finding of the High Court that there was a concluded contract. It was thus the plaintiff's contention that the first defendant sought to raise matters which were unconnected with its appeal, which was only against a part of the judgment *ie,* that no specific performance had been ordered. The plaintiff argued that the first defendant's appeal should have been filed by way of a notice of appeal and not by way of a notice of cross-appeal. The Court of Appeal agreed with the plaintiff and ruled that the cross-appeal should have been restricted to vary that part of the order that was being appealed by the plaintiff and should not be permitted to seek to reverse any other aspects of the decision of the High Court. The first defendant obtained leave to appeal to the Federal Court and the Federal Court held as follows:

> [23] We are of the view that under r. 8 of the RCA 1994 the first defendant cannot set aside the substantive finding of facts made by the High Court by way of notice of cross-appeal. The first defendant may only set aside the substantive findings of the High Court by way of filing a notice of appeal under r. 5 of the RCA 1994. Only an appeal by way of a notice of appeal constitutes a re-hearing. *Rule 8 of the RCA 1994 does not state that a notice of cross-appeal '... shall be by way of re-hearing'. Rule 8 of the RCA 1994 only provides that a respondent could only contend that the decision of the High Court should be varied if the respondent files the notice of cross-appeal within ten days after the service of the record of appeal.*
>
> …

[31] The Court of Appeal in the present case had rightly applied the principle enunciated in the English case of *Re Cavander's Trusts* (1881) 16 Ch D 270 which states that an appeal on a point which does not affect the original appellant cannot be by a cross-appeal. In other words, where the respondent wishes to raise matters which are unconnected with the substance of the appeal A by the appellant the respondent must proceed by way of a separate notice of appeal.

…

[36] It would appear that none of the parties in this case appealed against the entire decision of the High Court. The first defendant had failed to appeal against the finding of the High Court that the HK MOU was a binding contract. *The High Court's decision that there was a valid and binding agreement concluded between the plaintiff and the first defendant is adverse against the first defendant. It was thus incumbent on the first defendant to file a separate notice of appeal if it wanted the aforesaid decision to be reversed or set aside, rather than by filing a notice of cross-appeal.* The operative words of 'to contend' and 'decision of the High Court should be varied' under *r. 8(1) of the RCA 1994 clearly limits the contentions under a notice of crossappeal to effectively vary a decision,* not set aside a judgment or order. *It is incumbent on the first defendant to independently file a notice of appeal under r. 5 of the RCA 1994 to rehear the issues that were not decided in the first defendant's favour.* A notice of cross-appeal does not provide for a complaint to be re-heard. The first defendant is at liberty to file an independent appeal under s. 67(1) of the CJA 1964. (emphasis added)

[120] We agree with learned counsel for the appellant that the respondent may only cross-appeal against a point already in issue in a valid appeal since the cross-appeal derives its life from that appeal. Thus, where a High Court has rejected a respondent's argument and such a rejection result in a decision adverse to the respondent for which the respondent is aggrieved, then the respondent must file a separate notice of appeal and not a cross-appeal if the respondent wishes to reverse or set aside that decision. Likewise, if a respondent wishes the Court of Appeal to rehear the issues that were not decided in that respondent's favour, then that respondent must file an independent and separate notice of appeal.

[121] All that we have observed above is of course circumscribed by the need of the respondent to ensure that the questions of law are genuine questions of law and not a case where the real complaint is on the insufficient of the compensation awarded.

[122] The respondent may want to apply for an extension of time to file its separate notice of appeal if it is minded to. The valued principle in life that we should not do unto others what we would not like others to do unto us, which is not to unnecessarily object to extension or enlargement of time that does not seriously prejudice the objector, may now resonate with learned counsel. Perhaps, the appellant would still be magnanimous in not objecting.

[123] We had asked learned counsel for the respondent if it is serious with its cross-appeal to which he confirmed that he was serious irrespective of what we would decide with respect to its application to strike out the appellant's notice of appeal. We pause to reiterate that a notice of cross-appeal filed by a respondent derives its life from the notice of appeal filed by the appellant. The Federal Court in *Kabushiki Kaisha Ngu* (*supra*) had explained as follows:

> [32] The principle enunciated in *Re Cavander's Trusts* has been widely referred with approval across the Commonwealth jurisdiction. In the New Zealand's case of *In re Parker (Deceased) Crow v. Weston* [1948] NZLR 9 at pp 11-12 the Court of Appeal in Wellington held that:
>
> > The cross-notices on appeal are accordingly out of time: R 6 of the Court of Appeal Rules; and see *Re Cavander's Trusts.* Each could be good as a cross-appeal only with regard to a point already in issue in a validly-existing appeal. **The cross-notice on appeal is not of itself sufficient to set an appeal on foot, as it derives its validity from the appeal.** All the parties were aware of the facts, and should have been on their guard; and they should have protected themselves by one of them giving formal notice, of appeal when a respondent has given notice and the appellant withdraws a validly existing appeal, the respondent may elect to proceed with or to withdraw his notice: *The Beewin*g; but here there is no validly existing appeal If the cross notices were in time and held to be good even though the appeal was bad, and the appellant were still allowed to proceed on such cross-notices under R 6 (as to which there is no time-limit), this would render nugatory the whole purpose and effect of R 19. The notice under R 6 is only effective as to matter raised by the appeal itself, and if any matter is to be raised by the respondent on appeal that is not in issue as a result of the appellant's notice of appeal: a substantive appeal must be lodged by such respondent. (emphasis added)

[124] The Federal Court in a later case in *Douglas Ding Jangan & Ors v. Kerajaan Negeri Sarawak & Ors* [2021] 7 CLJ 653; [2021] 4 MLJ 946 had reaffirmed the principle set out in at *Kabushiki Kaisha Ngu* (*supra*) as follows:

> [33] Juxtaposed with the facts of the present case, the High Court's finding that the appellants have acquired and/or created communal NCR over the cleared areas, which formed the basis for its decision to allow para. 25(i) of the statement of claim, was a finding that was wholly averse to the first to fifth respondents. *It was therefore incumbent on the first to fifth respondents to file separate notices of appeal if they wanted the decision to be reversed or set aside. The decision cannot be reversed or set aside by way of cross-appeal under r. 8 of the RCA. It can only be done by way of a substantive appeal under r. 5.*
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> …
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> [35] It will immediately be seen that although the notices of cross-appeal sought for a variation of the High Court decision allowing para 25(i) of the statement of claim, the grounds in support of the cross-appeals in fact

sought for a completely different order. Far from asking for a variation of the decision, the respondents were actually seeking for an order that the entire decision of the High Court to allow para 25 (i) of the statement of claim be reversed or set aside.

[36] For all intents and purposes, the notices were notices of substantive appeal under r. 5 of the RCA disguised as notices of crossappeal under r 8. This is clear from the contents of the notices and made clearer by the basis on which the cross-appeals were filed – that there is no evidence to support the learned trial judge's finding that the appellants and/or those whom they represent have acquired and/or created NCR over the cleared areas or some patches of the cleared areas shown in exh D80 or D81 or both D80 and D81, contrary to the finding of the High Court.

[37] We do not find it to be correct in law for the respondents to mount such collateral attack on the decision of the High Court without filing notices of appeal of their own under r. 5 of the RCA. *A cross-appeal under r. 8 of the RCA is only for the purpose of varying the decision of the High Court that is appealed against by the appellant and not for the purpose of reversing or setting aside any decision of the High Court which no party to the action appeals against.* The cross-appeal must relate to the appeal brought by the appellant and not otherwise and no variation order under r. 8 of the RCA can be made in respect of a non-existent appeal.

[38] It is important to keep in mind that there was no appeal filed by the appellants nor by the first to fifth respondents against the decision of the High Court allowing para. 25 (i) of the statement of claim. The appellants' appeal was against the decision to dismiss their claim for the balance of the land areas other than the cleared areas. There was therefore nothing to vary in terms of r. 8 of the RCA in respect of the decision of the High Court to allow para. 25(i) of the statement of claim. (emphasis added)

[125] It is a case of one should be careful of what one wishes for – in this case, if the respondent wants the appellant's appeal to be struck out then the respondent's cross-appeal would fall with it as a cross-appeal derives its life and validity from a notice of appeal. It is a case of one cannot kill the other without being killed in the process.

[126] Little wonder that when an appellant withdraws its appeal, the respondent who has not given notice of cross-appeal, may under r. 10 of the RCA give notice of appeal and proceed therewith in the manner prescribed by the rules as follows:

10. Notice of appeal by respondent where notice of appeal withdrawn or appeal not entered

Where an appeal is withdrawn under rule 9, or where an appeal of which notice has been given is not entered within the time limited, **any respondent who has not given notice of cross-appeal may give notice of appeal** and proceed therewith in the manner prescribed by the foregoing rules; but in any such case the times limited for giving notice of appeal, entering the appeal, furnishing security for costs, and filing and serving the

A record of appeal may, on application to the Court or if the appeal has not been entered, to a Judge of the High Court, be extended so far as is reasonably necessary in all the circumstances of the case.

(emphasis added)

[127] In a case where the respondent had given its notice of cross-appeal but
B the appellant had failed to get its appeal ready by filing its record of appeal, the respondent under r. 19 may proceed with his cross-appeal. In such a case the respondent shall within such time as may be allowed by the court, file a record of appeal, as is required by r. 18. Rule 19 of the RCA provides as follows:

C **19. Failure to file record**

(1) Where an appellant omits to comply with rule 18 any respondent who has given notice of cross-appeal may proceed with his cross-appeal.

(2) In any such case the respondent shall, as soon as practicable, or within such time as may be allowed by the Court, file a record of appeal, as is
D prescribed by rule 18, together with copies thereof for the use of the Judges of the Court, and shall serve copies thereof on the appellant and any other parties to the appeal.

[128] Note that in the above instance the appellant's appeal is not struck out but will be disposed of at the hearing of the appeal.

E

[129] We trust that by saying more than is usually necessary since we have dismissed the application to strike out the cross-appeal upon learned counsel agreeing to withdraw the prayer, the respondent would have been forewarned of the risks it would face at the appeal proper.

F **Decision**

[130] To summarise we had allowed encl. 18 filed by the appellant for enlarging time to serve the record of appeal which was served one day late. It was clearly excusable and curable in the circumstances of the case when the MCO was in force. We made no order as to costs.

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[131] As for the other prayer in encl. 18 to strike out the cross-appeal we find that it should have been by way of a separate motion and in any event the appellant had agreed to withdraw that prayer and so we had dismissed that prayer. We made no order as to costs.

H **[132]** Enclosure 54 is the respondent's motion to strike out the notice of appeal. For the reasons given above, we had dismissed the respondent's motion with costs in the cause. The respondent said it is serious with its cross-appeal and if we were to strike out the main appeal, the cross-appeal would fall with it.

I **[133]** In any event, the questions of law to be decided on appeal have been set out in the memorandum of appeal and so the respondent is not prejudiced.